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In The
Supreme Court of the United States

October Term, 1948

No. ~~718~~ 52

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNEL IHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PERREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The
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October Term, 1948

No. 718

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL, DANIEL RODRIGUES FERREIRA, YUTAKA GOHARA, CORNELIHA, MASASHI KAGEYAMA, TOROICHI KANDA, FRANK GONSALVES PEREIRA, NOBORU TAKEUCHI, FRED TANIGUCHI, and GENKICHI WADA,

Petitioners,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decree of the United States Court of Appeals for the Ninth Circuit was entered January 14, 1949. (R. 392) The petition for writ of certiorari and brief in support thereof were filed April 11, 1949.

STATEMENT OF THE CASE

The statement of the case given on pages 2 to 8 of the petition is supplemented and controverted in the following respects.

This case was brought in the United States District Court for Hawaii[1] under 28 U.S.C. § 1343(3),[2] which confers jurisdiction on district courts of the United States of actions to redress the deprivation, under color of any law, custom or usage of any state, of any right secured by the Constitution, or by any law of the United States providing for equal rights of citizens, or of all persons within the jurisdiction, of the United States. (R. 5) The action was brought to restrain further proceedings in a criminal contempt case pending in the Circuit Court of the Fifth Circuit, Territory of Hawaii: (R. 21) Respondents are the presiding judge and prosecutor, respectively, in said contempt proceeding. (R. 11) Said contempt proceeding was brought to punish violations of a temporary restraining order issued by respondent circuit judge to regulate picketing during a strike in the sugar industry in the Territory in 1946. (R. 7-9) It was alleged in the complaint that plaintiffs (petitioners herein) were deprived by the issuance of such order of their right of peaceful picketing under the Norris-LaGuardia Act[3] and section 20 of the Clayton Act[4]

[1]The District Court for Hawaii has the jurisdiction of district courts of the United States. 48 U.S.C. § 642. In the revision of Title 28 of the U. S. Code, the District Court for Hawaii is to all intents and purposes a district court of the United States. 28 U.S.C. §§ 91, 132-135.

[2]Formerly 28 U.S.C. § 41(14).

[3]29 U.S.C. §§ 101-115; 47 Stat. 70-73.

[4]29 U.S.C. § 52; 38 Stat. 738.

and under the Constitution of the United States, and were threatened with further deprivation of such right by the prosecution of said contempt charge. (R. 6-20) The strike was over for more than ten weeks when this action was filed. A temporary restraining order was issued against respondent attorney general and a preliminary injunction was subsequently granted. (R. 49-51, 66-69)

Respondents filed an answer[5] to the complaint, incorporating as part thereof certified copies of the records and files in the original equity suit in the territorial court[6] and a transcript of the *ex parte* hearing upon which the restraining order complained of by petitioners was issued. Respondents subsequently filed a motion for hearing and determination of defenses before trial under Rule 12(d) of the Federal Rules of Civil Procedure and for dismissal of the suit. (R. 306-309) Petitioners filed a motion to strike those portions of respondents' answer which related to the original equity proceedings and the records thereof. (R. 309-310) Respondents filed another motion, under Rules 12 and 56, requesting that in ruling upon respondents' motion to dismiss, the District Court take into consideration the entire record made by the pleadings, including the exhibits attached to the complaint and answer. (R. 312) After a hearing on respondents' motions, which were considered as a motion for summary judgment, the District Court grant-

[5]Although separate answers were filed, one merely adopted the other. (R. 69-304, 305)

[6]The restraining order issued in a suit in equity brought by the Lihue Plantation Company, Ltd., against the International Longshoremen's & Warehousemen's Union (hereinafter abbreviated ILWU), its local units and the officers thereof, in the Circuit Court of the Fifth Circuit, Territory of Hawaii. (R. 23-31)

ed respondents' motions and entered judgment dismissing the action. (R. 314-340, 343-344) Upon appeal, the Court of Appeals for the Ninth Circuit affirmed judgment. (R. 392) The opinions of the District Court and the Court of Appeals are reported in 74 F. Supp. 865 and 172 F. 2d 176, respectively.

Respondents agree, as stated on page 2 of the petition, that the restraining order complained of in the instant case was issued *ex parte* and in a labor dispute. It is to be noted, however, that at the *ex parte* hearing, twenty-three affidavits were received in evidence (R. 96-158, 163-164, 246-249) and the testimony of nine witnesses heard by the territorial court (R. 165-172, 251-299), on the basis of which the court found that the strikers had exceeded the bounds of peaceful picketing in that they had prevented the employer's manager and supervisory employees from entering its sugar factory, had prevented free access to its general merchandise store and in effect had taken possession and control of both factory and store, and also had been guilty of mass picketing and intimidation, and that the employer was threatened with irreparable damage by reason of the interruption of its vital operations. (R. 173-174, 301-303) Moreover, at the hearing the question of the court's jurisdiction in the matter was raised by the court on its own motion, particularly with reference to the provisions of the Norris-LaGuardia and National Labor Relations Acts, and the question then argued by counsel for the employer. (R. 161-163) The jurisdictional question was subsequently raised again by the respondents in the equity suit by an oral motion to vacate and dissolve the restraining order and thereupon extensively argued by counsel for the parties and *amicus curiae*.

(R. 189-193, 235-238) One other fact that should be mentioned in connection with the proceedings in the original suit in equity was the response by the respondents therein on a day set by the court to consider a possible modification of its order. Instead of the appearance of their counsel as was expected by the court, the following message was received:

"RADIOGRAM

"Ihufwad 140 Drush Honolulu 23
Honorable Judge Philip L. Rice
Judge of the Fifth Circuit Court
Court House Lihue

"Confirmation copy telephoned Sept. 23, 1946, to Nakamura by F. W. Time 146 P Date 9/23/46

"Re hearing today on possible modification restraining order Lihue Plantation Company case we have instructed our attorneys Richard Gladstein and Richard Mirikitani not to appear, although the court has set hearing for today we have not actually been ordered to appear inasmuch as we regard the court's ex parte restraining order as improperly issue in excess of jurisdiction and denying union members due process of law we see no purpose in being represented at a hearing to modify an order which in the first place we consider to be void and issued in clear defiance of our constitutional right to be heard in advance of being judged once again we ask you to vacate the restraining order.

INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION,
JACK HALL,
Regional Director."
(R. 194)

The statements on page 4 and elsewhere in the petition and throughout petitioners' brief as to the

nature of the charges brought against petitioners for violating the restraining order are grossly misleading. The substance of the charges, which are substantially in the language of the applicable portions of the restraining order, is as follows: As the first count, that petitioners wilfully violated the restraining order by mass picketing, by assembling with many others in compact groups and congregating in crowds, on and near the employer's property, *to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from the employer's premises by its employees*, and, as the second count, that petitioners wilfully violated the restraining order by picketing with many others in groups of more than three pickets *at points of ingress to and egress from the employer's premises.* (R. 35, 39, 360, 363) The italicized portions are omitted in petitioner's version of the charges. Respondents have been repeatedly compelled in the proceedings before the District Court and the Court of Appeals and again before this Court to challenge petitioners on this matter.

Another matter requiring clarification is that of the relationship of the instant case to the case of *ILWU* v. *Wirtz*,[7] referred to in note 2 on page 2, note 5 on page 5 and note 8 on page 9 of the petition. The *Wirtz* case was a suit brought by the ILWU in the Supreme Court of the Territory of Hawaii for a writ of prohibition[8] against the judge of the Circuit Court

[7] 37 Haw. 404, affirmed 170 F. 2d 183 (C.A. 9th, 1948), certiorari denied February 28, 1949, rehearing denied May 2, 1949.

[8] The writ is defined by the Revised Laws of Hawaii 1945 as follows: "*Sec. 10270. Definition.* This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party

of the Second Circuit to restrain him from proceeding with a suit for injunction brought by another employer against the union during the same strike. The writ was denied. The sole question involved was whether the territorial court was a "court of the United States" within the meaning of the Norris-LaGuardia Act and as such subject to the jurisdictional limitations of said Act. Therefore, only the first of the issues set out in the four counts in the instant case was properly presented in the *Wirtz* case. It is true, however, that the petitioners in that case, notwithstanding the narrow question there in issue, argued the same issues as in this case.

Also requiring correction are the statements on pages 5 and 6 of the petition respecting the exceptional circumstances and irreparable injury allegedly "shown" to the District Court by petitioners. The circumstances referred to were actually mere assertions as to matters of fact or contentions as to matters of law made by petitioners' counsel during the course of argument. They were not "shown" in the sense that they were supported by any evidence, for there was no trial. Nor were they even supported by any allegation in petitioners' pleadings, for, as shown by the complaint in this case, the conduct on the part of respondents complained of, and purportedly "fully described" in the complaint (R. 6), consisted simply of the issuance of the restraining order and the prosecution of the criminal contempt charges for viola-

suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter arising therein is beyond its jurisdiction, or that it is not competent to decide it."

tions of the order of the territorial court. (R. 5-22)

The statement on page 8 of the petition that the appearance of *amicus curiae* in the District Court was "at the request of the respondents" is inaccurate. The request was made by *amicus*. As stated in the opinion of the District Court, "the application was . . . favored by the defendents". (R. 315)

Also, the statement on the same page (page 8) to the effect that the District Court ruled against petitioners and dismissed the complaint "without permitting petitioners to be heard on the merits" is misleading. There was no trial, it is true, for the case was disposed of on the defenses of law raised in respondents' answer. But there was a very extensive hearing on the issues of law, in which petitioners' counsel was allowed unlimited time for and latitude in argument.

Another statement on page 8 of the petition, that the Court of Appeals "held that the District Court erred in granting summary judgment without hearing on the merits", is obviously incorrect, as is shown by the sentence immediately following the statement in question as well as by the opinion of that Court. (R. 385; 172 F. 2d 176, 177)

Note 7 at the bottom of page 8 of the petition also requires correction. The only erroneous assumption respecting petitioners' contention that the criminal prosecutions are not in good faith is the assumption by petitioners that their contention is alleged in their complaint and that the District Court and respondents deemed the issue to have been raised by the complaint. Respondents have consistently maintained that the

pleadings do not raise such an issue and both the trial and appellate courts have so ruled. (R. 339, 387; 74 F. Supp. 865, 876, 172 F. 2d 176, 177)

QUESTION PRESENTED

The question presented in this case is whether petitioners, members of a labor union, are entitled to an injunction from the federal court to restrain the prosecution of a criminal contempt proceeding pending against them in a territorial court, in which petitioners are charged with wilfully violating a restraining order, issued by the territorial court in the course of a strike, which prohibited mass picketing to physically obstruct ingress and egress and limited the number of pickets at points of ingress and egress.

Petitioners' statement of the question presented, stated on page 10 of their brief, is subject to the following criticisms. The question of whether petitioners have been deprived of constitutional rights might be controlling in an action for damages but in a suit for injunctive relief, such as this case, the question should relate to the future. The characterization of the restraining order as one "prohibiting peaceful picketing and assembly" and of the pending prosecution as one "for engaging in peaceful picketing and assembly" is misleading and unfair, as previously pointed out on page 6 of this brief. There is no point to the question of whether they are entitled to a hearing on the merits of their complaint. As shown on page 8 of this brief, petitioners had a hearing on the merits of their complaint to which, the Court of Appeals held, they were not entitled. (R. 385; 172 F. 2d 176, 177)

ARGUMENT

1. The reasons relied on by petitioners do not justify granting certiorari.

On pages 10 to 14 of the petition, petitioners set out, in one unnumbered paragraph and in paragraphs numbered I to VI, the reasons relied upon by them for the granting of the writ. Respondents propose to show, by a brief discussion of each paragraph in order, that none of these paragraphs present a substantial reason for granting certiorari.

The unnumbered, or introductory paragraph, contains nothing but misleading statements. The statement that the issues in this case are of particular importance to workers in the Territory and to all residents of the territories and possessions, suggests that the territorial status is significant in this case. It is to be noted, however, that in the consideration of any constitutional issue of free speech or peaceful assembly, the territorial status of Hawaii is entirely immaterial, for the First Amendment liberties obtain in Hawaii in the same way that they do in the several states. *Hawaii* v. *Mankichi*, 190 U. S. 197. The statement that petitioners are "threatened" with criminal prosecution suggests that this case involves a threatened, instead of a pending, prosecution. The rest of the paragraph is a misstatement of the nature of the order and criminal prosecution against which petitioners seek to be relieved, previously commented upon on page 6 of this brief.

Paragraph I states that "the Court of Appeals has in effect sanctioned" an order issued by respondent judge restricting picketing, "in defiance of applicable

decision of this Court". Of course, neither the Court of Appeals nor the respondent judge has acted in defiance of this Court or any decision of this Court. As a matter of fact, the Court of Appeals held it was improper to consider the constitutional issue which petitioners sought to have reviewed. (R. 385; 172 F. 2d 176, 177) The fact that the courts have differed with petitioners as to which of the decisions of this Court are applicable in this case is not a sufficient basis for petitioners' statement. The statement to the effect that the order in question provides that only three persons could exercise the rights of free speech and assembly in concert is grossly misleading.

The statement in paragraph II of petitioners' belief that respondent judge has "acted in defiance of, and in flagrant violation of decisions of this Court" merits no further comment.

In paragraphs III and IV, petitioners contend that the order issued by respondent judge is in violation of the rights of free speech and peaceful assembly guaranteed by the First Amendment. Petitioners cite *Thornhill* v. *Alabama*, 310 U. S. 88, and *Marsh* v. *Alabama*, 326 U. S. 501, which are apparently among the applicable decisions referred to in the preceding paragraphs.

The statements in the second and third sentences of paragraph III, to the effect that the order defines " 'mass picketing' as 'three' " and also "prohibits the overt act of peaceably assembling", are incorrect. Petitioners apparently derive such a definition by selecting certain words from one provision of the order and combining them with certain other words

selected from another provision.[1] The order does not prohibit any assembly as such; the prohibition is against assembling for the purpose of obstructing ingress and egress.[2] Furthermore, the statement in the third sentence of paragraph IV that "the means of free communication of petitioners and of hundreds of people living in company towns . . . . have been denied, and fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation" is not justified by either the order or the facts.

Paragraph V contains petitioners' contention that the order issued by respondent judge must be judged on its face and that so judged, it is void, first, for contravening the First Amendment and, secondly, for being "so vague and ambiguous as to constitute a denial of due process". For the proposition that the order must be judged on its face, petitioners cite *A. F. of L.* v. *Swing*, 312 U. S. 321, and *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287.[3] The cases cited stand for two different rules respecting injunctions restrictive of picketing. In the earlier, the *Drivers Union* case, it was held that an injunction issued in a background of violence and other unlawful conduct

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[1]Paragraph 7 of the order prohibits "mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner . . . to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property . . ." (R. 45); a provision in the succeeding paragraph limits "the number of pickets . . to not more than three (3) pickets in a group at any point or station when stationed at points of ingress to and egress from the Petitioner's property . . ." (R. 46)

[2]The District Court so ruled. (R. 339; 74 F. Supp. 865, 875.)

[3]Petitioners' discussion of these cases in their brief at page 28 reveals that they are relying on a dissenting opinion in the *Drivers Union* case.

"must be read in the context of its circumstances". 312 U. S. 287, 298. In the *Swing* case, where the *Drivers Union* case is distinguished, it was held that an injunction which is issued, not because of violence or other unlawful conduct, but merely because there was no dispute between employer and employees, must be judged on its face. 312 U. S. 321, 325. Respondents submit that in view of the findings made by the territorial court upon which the order in question in the instant case was issued (R. 173-174, 301-303), which are summarized on page 4 of this brief,[4] the rule of the *Drivers Union* case is applicable in this case. However, this is not to be taken as an admission that the order is void if judged on its face. On the contrary, respondents will show in part 3 of this argument that it is valid under either test. The second sentence of this paragraph is subject to the same criticism already stated on page 6 of this brief.

Paragraph VI consists of petitioners' contentions that their complaint sets forth a cause of action within the principle of *Hague* v. *CIO*, 307 U. S. 496, and *Douglas* v. *Jeannette*, 319 U. S. 157, and that they are entitled to a hearing on the merits. To the contrary, the Court of Appeals has held that under the

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[4]The District Court summarized the circumstances as follows:
". . . The situation made to appear to Judge Rice by affidavit and evidence was one of increasing tenseness lending reasonable credence to the belief that if things were allowed to continue, with ineffective police control, bloodshed might easily ensue. The described scene was one of mill and store entrances solidly blocked by hundreds of massed pickets preventing anyone from going in or out even for maintenance purposes, of plantation roads blocked, or homes picketed and families threatened, annoyed, and disturbed, and of a rising tempo of non-peace inducing language wherever pickets were assembled . . ." (R. 338)

principle of the *Jeannette* case, the District Court erred in considering the merits of petitioners' complaint and that the complaint should have been dismissed for want of equity. (R. 385; 172 F. 2d 176, 177) Petitioners also contend in this paragraph that questions of constitutionality should not be decided on the basis of a demurrer to the complaint or like pleadings, but should be determined upon the evidence if it is likely to throw light on the question. Such contention has no application to the decision sought to be reviewed by this petition, for the Court of Appeals not only declined to consider the merits of petitioners' contentions as to the constitutionality of the order attacked by the complaint, but ruled that it was error for the District Court to have considered such questions. Furthermore, the contention seems inconsistent with the contention made in paragraph V that the order in question is void on its face.

It appears from the foregoing review of the petition that the only reason advanced for the granting of certiorari is petitioners' contention that the decision of the Court of Appeals is at variance with their interpretation of the decisions of this Court. It is respectfully submitted that it is the petitioners, and not the Court of Appeals, who are in error. Notwithstanding their many statements, there are but two contentions which require further consideration: (1) that their complaint states a cause of action for injunctive relief, and (2) that the order of the territorial court of which they complain contravenes the First Amendment. Respondents believe that the latter question is not in issue in this case, but assuming *arguendo* that it is, propose to discuss both questions

in the following portions of this brief. It is respectfully submitted that the argument will clearly show that petitioners' contentions are not supported by the applicable decisions of this Court and that, therefore, there is no substantial basis for granting certiorari in this case.

2. The Court of Appeals correctly held that the District Court should not have entertained the injunction proceeding. The usual rule against collateral interference by a federal court in a pending non-federal criminal prosecution applies.

While the District Court dismissed the case, holding that the territorial circuit judge had the power to issue the temporary restraining order, upon which the pending criminal contempt charges are based, and that its terms were valid (R. 314-340; 74 F. Supp. 865), the Court of Appeals held that under the doctrine of *Douglas* v. *Jeannette*, 319 U. S. 157, petitioners' case was not cognizable in equity. (R. 384-391; 172 F. 2d 176) The Court of Appeals further held that by reason of the principles of the *Jeannette* case, the applicability in the Territory of Hawaii of section 265 of the Judicial Code, 28 U.S.C. § 379, now section 2283 of the new Title 28, need not be considered.

a. The rule stated

We have pointed out that the instant case solely concerns criminal charges pending in the territorial court. This suit was brought in the federal court in an attempt to use injunctive relief as a means of quashing the pending criminal charges. This Court has held that even apart from section 265 of the Judicial Code, 28 U.S.C. § 379, now section 2283 of the new

Title 28, a federal district court is not authorized to use injunction proceedings as a means of quashing criminal charges pending in a state court. *Harkrader* v. *Wadley*, 172 U. S. 148, 165; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217; *Ex parte Young*, 209 U. S. 123, 162 (distinguishing threatened prosecutions from pending proceedings); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (affirming grant of injunctive relief as to future prosecutions but reversing with respect to a pending criminal case and holding that such pending prosecution could not be enjoined); *In re Sawyer*, 124 U. S. 200, 210 (denying equitable jurisdiction to restrain removal of public officers, by analogy to rule against stay of criminal proceedings). The cases are reviewed and the distinction between pending and merely threatened prosecutions emphasized in *Babcock* v. *Noh*, 99 F. 2d 738, 739 (C.A. 9th, 1938); *Priceman* v. *Dewey*, 81 F. Supp. 557, 559 (D.C.E.D.N.Y., 1949); *Society of Good Neighbors* v.*Groat*, 77 F. Supp. 695 (D.C.E.D. Mich., 1948); 42 Yale L. J. 1169, 1191. The district judge therefore erred in holding that he had discretion to interfere in the pending criminal proceedings. (R. 324; 74 F. Supp. 865, 870)

To the usual rule of non-interference in pending state criminal cases is added the positive statutory prohibition against the issuance of injunctions to stay any pending state court proceedings. *Essanay Film Co.* v. *Kane*, 258 U. S. 358, 361; *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118. The exceptions to the statutory rule are well defined and the instant case does not fall within any of them. The conclusion is the same whether the case is considered in the

light of the provisions of section 2283 of the new Title 28, or the recognized statutory and judicial exceptions under section 265 of the former Judicial Code, 28 U.S.C. § 379.[1]

b. The rule applied to civil rights cases

The first exception made in section 2283 is contained in the words "except as expressly authorized by Act of Congress". The courts already had recognized that Congress might expressly authorize exceptions to the rule against stay of pending proceedings. The statutes creating such exceptions have been enumerated.[2] With respect to the jurisdiction conferred by the Civil Rights Act, Congress made no such exception. It expressly provided that such jurisdiction "shall be exercised and enforced in conformity with the laws of the United States" and, in some instances, "the common law, as modified and changed by the constitution and statutes of the State wherein the court . . . is held". R. S. 722, 8 U.S.C.A. § 49a (contained in March 1949 supplement to U.S.C.A.), formerly 28 U.S.C. § 729. As stated by Mr. Justice Holmes:

> " . . . the language of § 1979 [8 U.S.C. § 43] does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer

[1] This case antedates the new Title 28, the case having been decided by the District Court on December 22, 1947. (R. 344)

[2] *Toucey* v. *New York Life Ins. Co., supra*, 314 U.S. 118; *Bowles* v. *Willingham*, 321 U. S. 503.

to existing standards to determine what is a proper proceeding . . . "

Giles v. *Harris*, 189 U. S. 475, 486

Were the sphere of equitable jurisdiction of the United States district courts extended by R. S. 1979 (8 U.S.C. § 43), such extension would include every alleged deprivation of constitutional rights. The resultant exception to the usual standards would be so broad as to nullify not only section 2283 of the new Title 28 (section 265 of the former Judical Code) but also every other rule governing the withholding of injunctive relief. This Court has always applied the usual limitations on the exercise of equity jurisdiction in cases brought under the Civil Rights Act the same as in other cases. *Douglas* v. *Jeannette*, *supra*, 319 U. S. 157; *Bevins* v. *Prindable*, 314 U. S. 573. The Court of Appeals held in the instant case that if section 2283, formerly 28 U.S.C. § 379, applies in the Territory (a question the Court did not decide), the instant case presents no congressional exception. (R. 391; 172 F. 2d 176, 179) The following cases in other circuits are to the same effect, in each of them the statute, then section 265 of the Judicial Code, 28 U.S.C. § 379, having been applied by a district court in a civil rights case: *United Electrical, R. & M. Workers* v. *Westinghouse Electric Corp.*, 65 F. Supp. 420 (D.C.E.D. Pa., 1946); *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C.W.D. Pa., 1946); *Mickey* v. *Kansas City*, 43 F. Supp. 739 (D.C.W.D. Mo., 1942); see also *Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927, 928 (D.C. Mass., 1947); *Davega-City Radio, Inc.* v. *Boland*, 23 F. Supp. 969 (D.C.S.D. N.Y., 1938). That the Civil Rights Act is not an

exception to the statutory rule against stay of pending proceedings was expressly held in *Hemsley* v. *Meyers*, 45 Fed. 283, 289-290 (C. C. Kans., 1891); *Aultman & Taylor Co.* v. *Brumfield*, 102 Fed. 7, 12 (C.C.N.D. Ohio, 1900); *Live-Stock Dealers' & Butchers' Assn.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.*, 1 Abb. U. S. 388, 15 Fed. Cas. p. 649, Case No. 8408 (C. C. La., 1870).

The second and third exceptions mentioned in section 2283 likewise do not apply.[3]

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[3]The second exception mentioned in section 2283 concerns a stay granted by a court of the United States "where necessary in aid of its jurisdiction". This likewise codifies an existing exception, relating to cases where possession of a res is necessary to jurisdiction and the federal court was the first to acquire possession of the res. *Toucey* v. *New York Life Insurance Co., supra*, 314 U. S. 118, 135. The exception has not been applied to actions in personam. *Mandeville* v. *Canterbury*, 318 U.S. 47, 49; *First National Bank & Trust Co.* v. *Village of Skokie*, 173 F. 2d 1 (C. A. 7th, 1949). The exception might be applied where the jurisdiction of the federal court attached first and where the express purpose of the federal action was to enjoin the bringing of the state court action, filed notwithstanding. *Looney* v. *Eastern Texas R. R.*, 247 U. S. 214; *Truax* v. *Raich*, 239 U.S. 33, 36, affirming 219 Fed. 273, 284. This is not the instant case, for the criminal charges were filed first and then the federal court action was brought to quash the pending charges. Another instance of the application of the exception in aid of jurisdiction is mentioned in the Revisers' notes on section 2283 where reference is made to the stay of proceedings in state cases removed to the district courts, but this was already deemed an exception made by congressional act. *Toucey* v. *New York Life Insurance Co., supra*, 314 U.S. 118, 133. The instant case is not a removal case.

The third exception mention in section 2283 concerns a stay granted by a court of the United States "to protect or effectuate its judgments". This relates to the power to enjoin relitigation in state courts of cases and controversies already fully adjudicated by federal courts. The Revisers' notes state that the exception was inserted to grant a power disclaimed by this Court in the *Toucey* case. It represents the only instance in which section 2283 departs from the *Toucey* case. The exception has no bearing on this case.

c. The rule applicable in Hawaii

The rule that injunctive relief is not a means of quashing pending criminal charges applies whether such criminal charges are pending in a court of the Territory of Hawaii or in a state court. In Hawaii, as in a state, the maintenance of law and order centers in the territorial courts, only the enforcement of federal statutes in the federal court. Hence, all of the reasons for the rule of non-interference by injunctive process in pending criminal cases, and for requiring exhaustion of the remedies available in the system of courts where the criminal prosecution lies and upon appeal therefrom, apply equally in Hawaii. In the instant case the district court assumed jurisdiction over a territorial criminal prosecution which could not be removed to it, and in effect extended the scope of the applicable removal statute by injunctive process (see *Aultman & Taylor Co.* v. *Brumfield*, *supra*, 102 Fed. 7, 12) so as to bring before itself the question whether the criminal charges should be quashed. The Court of Appeals rightly held that the District Court should not have entertained the case.

The relation between the United States District Court for Hawaii and the courts of the Territory of Hawaii is and always has been recognized to be the same as that between the courts of the United States and the courts of a state.

This principle as to the relation between the District Court for Hawaii and the territorial courts was recognized by this Court in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 383, when it held that the doctrine of abstention which withholds rulings by federal courts upon the constitutionality of state statutes

until the interpretation and application thereof have been decided by the state courts, applies equally to stay the hand of the District Court for Hawaii until the territorial courts have construed territorial statutes.

Section 86 of the Hawaiian Organic Act (48 U.S.C. §§ 641-642, 643-645) at all times since its original enactment (31 Stat. 141, c. 339) has provided, and still with slightly different wording,[4] provides, that:

> " . . . The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."
>
> 48 U.S.C. § 645.

Said section 86, prior to the enactment of Title 28 of the United States Code and when this case was decided by the District Court, also provided that the laws relating to jurisdiction of district courts of the United States and the manner in which they proceed should govern the court created by said section 86 (48 U.S.C. § 642). This part of section 86 was deleted upon the enactment of Title 28 of the United States Code because said court was included in that title as

[4]Public Law 773, 80th Cong., 2d Sess., which enacted the new Title 28 of the United States Code as section 1 of that Act, provides in section 8 that section 86 of the Hawaiian Organic Act is amended to read as follows:

> "Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of United States and the courts of the Territory of Hawaii."

a district court of the United States, as noted on page 2 of this brief.

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C.A. 9th, 1901), aff'd 183 U. S. 545. Such has been the relation of the courts since their inception. The Court of Appeals so held in this case (R. 390; 172 F. 2d 176, 179), as did the District Court in this case (R. 60, 64; 69 F. Supp. 897, 899, 901), and in *Hall* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533, 535. The principle was firmly established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U.S. D.C. Haw. 34 (1900); *In re Atcherley*, 3 U.S.D.C. Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U.S.D.C. Haw. 502, 506 (1910); *In re Curran*, 4 U.S.D.C. Haw. 730, 738 (1916). Other cases relying on the same principle are *United States* v. *Bower*, 4 U.S.D.C. Haw. 466 (1914); *Yeung* v. *Territory*, 132 F. 2d 374, 378 (C.A. 9th, 1942). The judicial pronouncement as to the relation between the territorial system of courts and the federal court in Hawaii is confirmed by the legislative history of the Hawaiian Organic Act.[5]

[5]Hawaiian Commission Message, Sen. Doc. No. 16, 55th Cong.,

d. The rule applicable in instant case

Since the rule applies to civil rights cases and in the relations between the territorial courts and the federal court in Hawaii, it was the duty of the District Court to dismiss petitioners' suit. Respondents have insisted on this defense from the outset of this case. However, in an endeavor to take the case out of the usual rule against collateral interference of a federal court in a pending non-federal criminal prosecution, petitioners, in the course of the hearings in the District Court, made numerous contentions attacking the respondent attorney general for bringing the criminal contempt proceeding and the respondent judge for entertaining it. (Footnote 6, pp. 5-6 of the petition and pp. 19-20 of petitioners' brief.) As held by the District Court and the Court of Appeals, their complaint alleged "no conspiracy or wrongful connection between the prosecution and the employer". The complaint simply attacks the sufficiency of the temporary restraining order, issued by the respondent judge, to sustain the pending criminal contempt charges. Said the Court of Appeals:

> "While the complaint alleges that the claimed unlawfulness of the injunction against picketing wrongfully will 'intimidate' appellants, it is apparent that if it be lawful, which is the question in issue, no such consequence will follow."
>
> (R. 387; 172 F. 2d 176, 177)

3d Sess., pp. 162-164; H. R. Rep. No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong., 1st Sess., which bill was later incorporated by the House into Sen. 222, the Hawaiian Organic Act (see H. R. Rep. No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649, 4733.

The Court of Appeals then held that such issue must be heard and decided in the criminal case.

Even if the complaint had alleged bad faith, such allegations would not have taken the case out of the usual rule against collateral interference in a criminal prosecution already brought where the state remedies have not been exhausted.[6] Similarly, allegations

[6]*Mooney* v. *Holohan*, 294 U.S. 103, allegations of knowing use of perjured testimony by prosecuting authorities and deliberate supression of rebutting testimony, applicant for writ of habeas corpus required to exhaust remedies in state courts; *Ex parte Hawk*, 321 U.S. 114, 116, similar; *East Coast Lumber Terminal, Inc.* v. *Town of Babylon*, 17 L. W. 2505 (C.A. 2d, April 5, 1949), aff'g 81 F. Supp. 701, allegations that enforcement against plaintiff of ordinance, claimed to be unconstitutional, was in a discriminatory, illegal and corrupt manner so as to destroy plaintiff's business allegedly competitive with business in which defendant, its attorney and officials were interested, application for injunction against enforcement of ordinance at time when criminal proceeding was pending in justice of the peace court and about to be removed to court of record for trial held, remedies in state courts must be exhausted; *Society of Good Neighbors* v. *Groat, supra*, 77 F. Supp. 695 (D.C.E.D. Mich., 1948), allegations that prosecuting attorney and judge, together with others, had entered into conspiracy to destroy plaintiff organization, that investigation by defendant judge acting as one-man grand jury was being illegally conducted, that statute on which investigation founded was unconstitutional, application for injunction denied, held, by analogy to habeas corpus cases, remedies in state courts must be exhausted. Most of the cases are habeas corpus cases, since attempts to quash criminal charges by injunction are uncommon. It is well established in such cases, in line with *Mooney* v. *Holohan* and *Ex parte Hawk, supra*, that allegations of bad faith do not excuse failure to exhaust state remedies. See *United States ex rel. Lesser* v. *Hunt*, 117 F. 2d 30 (C. A. 2d, 1941), holding petition considered in 34 F. Supp. 730 should not have been considered on the merits; *United States ex rel. Steele* v. *Jackson*, 171 F. 2d. 432 (C. A. 2d, 1948); *Sharpe* v. *Buchanan*, 121 F. 2d 448 (C. A. 6th, 1941), aff'g 36 F. Supp. 386, petition considered on the merits after state remedies exhaused, 135 F. 2d 974, pursuant to remand of this Court, 317 U. S. 238, petition denied, 142 F. 2d 213, cert. denied 322 U. S.

of discrimination do not excuse failure to exhaust state remedies.[7] Even when the criminal case arises in a federal court, such allegations of official misconduct are not a basis for collateral attack when they might have been urged by way of defense upon the trial and by appeal.[8]

The sugar strike was over when petitioners filed their complaint, and the case presents no application for protection against future interference with the continued enjoyment of lawful rights. The case is wholly unlike *Hague* v. *C.I.O.*, 307 U. S. 496[9], where

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75[8]; *Sweet* v. *Howard*, 155 F. 2d 715 (C. A. 7th, 1946), relating to alleged duress used by prosecutor in obtaining plea of guilty.

[7]*In re Wood*, 140 U.S. 278, 287, relating to alleged racial discrimination in the selection of a grand jury; *In re Shibuya Jugiro*, 140 U. S. 291, 298, similar; *Johnson* v. *Wilson*, 131 F. 2d 1 (C. A. 5th, 1942), cert. denied 316 U.S. 693, similar; *Hale* v. *Crawford*, 65 F. 2d 739 (C. A. 1st, 1933), cert. denied 290 U. S. 674, similar; *United States* v. *Brady*, 133 F. 2d 476, 481 (C. A. 4th, 1943), cert. denied 319 U.S. 746, similar; *Powell* v. *Meyer*, 147 F. 2d 606 (C. A. 3d, 1945), alleged denial of equal protection at petitioner's trial; *United States* v. *Snyder*, 160 F. 2d 351, 353 (C. A. 2d, 1947), alleged discrimination against negroes by parole board and in selection of jury. See *Virginia* v. *Rives*, 100 U. S. 313, relating to an application under the removal statute; cf. *Ex parte Virginia*, 100 U. S. 339, as to the criminal character of the abuse of power there involved; to the same effect, *Gibson* v. *Mississippi*, 162 U. S. 565, *Murray* v. *Louisiana*, 163 U. S. 101.

[8]*Young* v. *Sanford*, 147 F. 2d 1007 (C. A. 5th, 1945), cert. denied 325 U. S. 886; *Burall* v. *Johnson*, 134 F. 2d 614 (C. A. 9th, 1943), cert. denied 319 U. S. 768; *Dorsey* v. *Gill*, 148 F. 2d 857, 877 (C.A.D.C., 1945), cert. denied 325 U. S. 890.

[9]Cited and relied on by petitioners in their petition and brief, pp. 13, 16, 19. Other cases cited in petitioners' brief on this point are likewise distinguishable: *Board of Education* v. *Barnette*, 319 U. S. 624, *Terrace* v. *Thompson*, 263 U. S. 197, and *A. F. of L.* v. *Watson*, 327 U. S. 582, involved the question of relief against threatened prosecutions, as in the *Jeannette* case; *Truax* v. *Raich*, 239 U. S. 33, is explained in note 3 on page 19 of this brief. *Ex parte Royall*, 117 U. S. 241, is

it was alleged, and the court found, that meetings conducted in an orderly and peaceful manner were broken up by officials acting under the guise of law enforcement officers but whose real purpose was to remove the complainants' agents from the city, not to bring them before a court of justice. In the *Hague* case the purpose of the suit was to promote and protect the future exercise of lawful rights, and not, as here, to prevent the question of punishment of past acts from being lawfully adjudicated in the system of courts where there now lies, and did lie when the complaint herein was filed, a criminal prosecution based on such past acts.

Petitioners' contentions as to the invalidity of the restraining order, upon which the pending criminal prosecution in the territorial court is based, are properly the subject of defense in such prosecution. And, as pointed out by the Court of Appeals in its opinion (R. 385; 172 F. 2d 176, 177), should their contentions not be sustained and should they be tried and convicted, petitioners would have an adequate remedy at law by appeal to the Supreme Court of Hawaii and thereafter to the Court of Appeals. It is, therefore, respectfully submitted that petitioners' case was not within the equitable jurisdiction of the District Court.

3. The constitutionality of the order of the territorial court restricting picketing is sustained by the decisions of this Court.

Respondents believe that the determination of the question of whether the complaint sets forth a cause of action for injunctive relief is conclusive of this

one of the early cases in the line of habeas corpus cases establishing the rule of exhaustion of remedies.

case. Nevertheless, in view of petitioners' insistence upon their contention that the order of the territorial court is in contravention of the rights of free speech and peaceful assembly guaranteed by the First Amendment, respondents deem it desirable to submit a brief statement on the question of constitutionality. The question, then, is whether the order issued by respondent judge was in violation of the right of peaceful picketing which is derived from the First Amendment.

a. The applicable decisions

Respondents readily recognize the rule established in the cases cited on page 25 of petitioners' brief and other decisions of this Court in the same line, beginning with *Thornhill* v. *Alabama*, 310 U. S. 88. Likewise, petitioners concede that the rights of free speech and assembly are not unqualified rights but are subject to regulation in the public interest, and recognize the force of the dictum in the *Thornhill* case, 310 U. S. 88, 105, and the decision in *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287.[1] Since, on the one hand, petitioners rely on the general principle of the *Thornhill* case and respondents, on the other, rely on the exception thereto reserved by the dictum in that case and established in the *Drivers Union* case, the point at issue between the parties is as to which is the applicable line of authority.

Thornhill v. *Alabama*, *supra*, decided in 1940, was the first of the cases sustaining the right to picket on a constitutional basis. Upon an appeal from a conviction under an Alabama anti-picketing statute,

[1]Petitioners' brief, pp. 29-30.

the statute was held invalid because it was too broad, the statute having prohibited all picketing irrespective of the nature of the picketing, peaceful or otherwise. The picketing for which the defendant was prosecuted was of a peaceful nature and no violence was involved. This Court took pains, however, to point out that the right to picket is not an absolute, unqualified right:

> " . . . We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Founderies* v. *Tri-City Council*, 257 U. S. 184, 205. . . ."
>
> 310 U. S. 105.

It is significant that this Court qualified the right to picket in the very case in which the right was first given effect. And it was not long before the dictum became law, for the next case on the subject was *Drivers Union* v. *Meadowmoor Co.*, *supra*, decided the following year.

Like the *Thornhill case*, the *Drivers Union* case came to this Court through the state courts. The company filed a suit in equity in Illinois against the union to enjoin picketing of stores where the company's products were sold. A restraining order issued, enjoining all union conduct, peaceful as well as violent, and the case was referred to a master. The master found that considerable violence had occurred and recommended that all picketing be enjoined. The trial court enjoined only the violence and permitted peaceful picketing. Upon appeal, the state supreme court reversed the trial court and ordered that the injunc-

tion prohibit all picketing. Upon appeal, this Court affirmed the action of the state supreme court. The Court held that the states have power, by the use of equity powers vested in the courts, to prevent coercion, and where picketing has been enmeshed with violence, the courts have power to enjoin all picketing for such purpose. The Court also squarely held that the Constitution does not preclude the exercise of injunctive powers against picketing:

> ". . . Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .
>
> ". . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."
>
> 312 U. S. 294-295

Unlike the *Thornhill* case, which related to the validity of a general statute, this case involved a specific injunction. The dictum of that case was nevertheless held to be equally applicable to an injunction as to a properly drawn statute:

> "(1) We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on

free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut*, 310 U. S. 296; *American Federation of Labor* v. *Swing*, *post*, p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . as to justify a statute narrowly drawn to cover the precise situation given rise to the danger.' 310 U. S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

"(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann* v. *Raimist*, 255 N. Y. 307; 174 N. E.

690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert . . . "

312 U. S. 297-298.

The *Drivers Union* case established beyond doubt that the right to picket is not an absolute or unqualified right, but that it may not only be regulated but even forfeited under certain circumstances. Subsequent decisions show that the right is subject to other limitations. Thus, where the purpose of the picketing is not legitimate, an injunction restraining peaceful picketing will likewise be upheld. *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942): injunction against secondary picketing sustained; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (1949): injunction against picketing to induce violation of state anti-trade-restraint law sustained.[3] Also indicating the qualified nature of the right to picket is *Allen Bradley Local* v. *Board*, 315 U. S. 740 (1942), wherein an order of the Wisconsin Employment Relations Board prohibiting mass picketing, threatening of employees desiring to work, obstructing points of ingress and egress and streets and highways, and picketing of employees' homes, was held not to be in conflict

[3]See also: *Fred Wolferman, Inc.* v. *Root*, 356 Mo. 976, 204 S. W. 2d 733 (1947), *cert. den.* 333 U. S. 837; *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 38 N. E. 2d 685 (1942); *Saveall* v. *Demers*, 76 N. E. 2d 12 (Mass., 1947); *Markham & Callow* v. *International Woodworkers*, 170 Ore. 517, 135 P. 2d 727 (1943); *Swenson* v. *Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Retail Clerks' Union* v. *Wisconsin Employment Rel. Bd.*, 242 Wis. 21, 6 N. W. 2d 698 (1942).

with the Norris-LaGuardia Act and was sustained as a valid exercise of the state police power.

The *Drivers Union* case is, of course, the leading case on the effect of violence and other unlawful conduct on the right to picket. Following it are a substantial number of federal and state cases, including: *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C. Pa., 1946); *Steiner* v. *Long Beach Local*, 19 Cal. 2d 676, 123 P. 2d 20 (1942); *People* v. *Saff*[illegible] 74 Cal. App. 2d 967, 168 P. 2d 497 (1946); *Unite*[illegible]*ates El. Motors* v. *United E. R. & M. Workers*, [illegible]6 P. 2d 921 (L. A., Cal., Super. Ct., 1946); *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers*, 139 N. J. Eq. 97, 49 A. 2d 896 (1946); *Isolantite* v. *United Elec., Radio and Mach. Workers*, 132 N. J. Eq. 613, 29 A. 2d 183 (1942); *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers*, 353 Pa. 446, 46 A. 2d 16 (1946). See also: *Lassiter* v. *Swift & Co.*, 50 S. E. 2d 359 (Ga., 1948); *Weyerhaeuser Timber Co.* v. *Everett Dist. Council*, 11 Wash. 2d 503, 119 P. 2d 643 (1941); *New England Novelty Co.* v. *Sandberg*, 315 Mass. 739, 54 N. E. 2d 915 (1944); *Western Electric Co.* v. *Western Electric Emp. Ass'n.*, 137 N. J. Eq. 489, 45 A. 2d 659 (1946); *General Electric Company* v. *Andrew Peterson, et al.*, 61 N. Y. S. 2d 813 (1946); *General Electric Co.* v. *United E. R. & M. Workers*, 67 N. E. 2d 802 (Ohio C. P., 1946).

Petitioners seek to distinguish the *Drivers Union* case from the instant case on two grounds, first, that this case involves a mere temporary restraining order issued after an *ex parte* hearing while the injunction in the other case was issued after extended hearings, and secondly, that the background of this case does

not show violence of such scale, intensity or duration as was present in that case. As to the first, however, the opinion of this Court states that upon the filing of the suit for injunction in the *Drivers Union* case, "a preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report." 312 U. S. 287, 291. But even assuming that there was a distinction as to the nature of the proceedings upon which the respective orders in these cases were issued, respondents believe there is nothing in the First Amendment or in the decisions of this Court which supports such a distinction. Petitioners cite no authority for their contention. As to the other contention, respondents submit that it does not require window smashing, bombing, burning of stores and physical violence over a period of three or four years to move the protective hand of equity. Neither the dictum in the *Thornhill* case nor the decision in the *Drivers Union* case imposes such an outrageous test. Thus, the dictum in the *Thornhill* case is to the effect that "picketing *en masse* or otherwise conducted" which might occasion imminent and aggravated danger to the public peace or the privacy, lives or property of the inhabitants would justify a statute narrowly drawn to protect such intersets. The significance of the background of violence in the *Drivers Union* case lay in the coercive effect of the fear of future violence generated by the past violence. 312 U. S. 287, 294. The remedy of injunction is in nature preventive or protective. It is the character of the harm threatened, rather than that inflicted, which determines the exercise of the power. Respondents submit the rule of

the *Drivers Union* case is not a departure from the fundamental rule.

True, the right is not to be denied on slight or trivial grounds, "a trivial rough incident or a moment of animal exhurberance," 312 U. S. 287, 293. The findings upon which the order complained of in the instant case was issued, have been previously summarized on pages 4 and 13 of this brief. Both the territorial court, which heard the evidence, and the federal court, which reviewed the evidence, found that the company's property had been seized, that coercion and intimidation had occurred and that further serious and irreparable harm to property and disturbances of the public peace were threatened. (R. 173-174, 301-303; 338) Respondents submit that the order in this case is clearly sustained by the decisions of this Court.[3]

b. Other objections to order

So far as can be determined from the complaint, the constitutionality of the order is attacked merely on the general allegation that it is one "denying plaintiffs the free exercise of their right to picket peacefully". (R. 18-19) The complaint contains no specification of unconstitutionality. The general question of the power of courts to regulate picketing is not pressed in the petition. As noted above, petitioners

[3]In *Steiner* v. *Long Beach Local, supra,* 19 Cal. 2d 676, 123 P. 2d 20 (1942), the court stated that extreme physical violence was not necessary to bring a case within the rule. In *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers, supra,* 139 N. J. Eq. 97, 49 A. 2d 896 (1946), the court held that factors other than violence, such as intimidation, coercion, duress, fraud and force, also operate to bar the right to picket.

concede that the rights of free speech and peaceful assembly are not unqualified, but are subject to regulation, and petitioners even recognize the rule of the *Drivers Union* case.[4] Petitioners, however, argue a number of more specific objections to the order on pages 26 to 35 of their brief. The objections that the order was issued "without hearing and without finding . . . of great and imminent danger to the state and public" (p. 26) are covered by the immediately preceding discussion in this brief. Petitioners also object to the limitation to three pickets at points of ingress and egress. In a dissenting opinion in the *Drivers Union* case, it is stated that the right to picket might, if necessary, be limited to even two or three. 312 U. S. 287, 319. From the cases cited on page 32 of this brief, it is clear that obstruction and interference with ingress and egress may be prevented by prohibiting mass picketing and by limiting the number of pickets at such points. The cases have varied as to the number to which pickets at points of ingress and egress have been limited. Since the reasonableness of the limitation is relative to the circumstances of the particular case, it is a question which the court issuing the order is in the best position to determine. *Drivers Union* v. *Meadowmoor Co.*, *supra*, 312 U. S. 287, 294. Petitioners further object that the order was too broad in that it covered the entire membership petitioners' union and the extensive property of the company, including company towns. It is apparent that a provision for preventing obstruction of

[4]Petitioners' brief, pp. 29-30.

access, for example, would not be effective unless it covered all who might take such action and all property to which access would be desired. The objection that the language of the order is vague and ambiguous is also lacking in substance. All such objections were presented to, and considered by, the District Court, which ruled that the order was valid. (R. 339; 74 F. Supp. 865, 876) Respondents submit that petitioners' objections to the order do not sustain their charge of unconstitutionality.

4. Petitioners are liable to prosecution for criminal contempt for violating the order of the territorial court regardless of the constitutionality of such order.

Respondents submit that under the decisions of this Court in *Howat* v. *Kansas*, 258 U. S. 181, and *United States* v. *United Mine Workers*, 330 U. S. 258, the merits of petitioners' complaint are entirely immaterial in determining whether they are entitled to relief and that the same considerations underlying those decisions (330 U. S. 258, 310-312) require that the pending criminal contempt proceeding in the territorial court be permitted to proceed without further restraint by the federal court.

CONCLUSION

Respondents respectfully submit that the petition presents no substantial reason for granting certiorari and that therefore the petition should be denied.

Dated: Honolulu, Territory of Hawaii, this 25th day of June, 1949.

Respectfully submitted,

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